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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHRISTINE BREWER, Plaintiff and Respondent, v. PREMIER GOLF PROPERTIES, Defendant and Appellant.	D051841 (Super. Ct. No. GIE027293)

Appeal from an order of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed.

Christine Brewer, a waitress employed at the Cottonwood Golf Club restaurant, filed an action against her employer, Premier Golf Properties, LP, dba Cottonwood Golf Club (Cottonwood) asserting numerous causes of action. Among her claims were causes of action for violations of various Labor Code[1] sections, including the meal break and rest break requirements (§ 226.7), the pay stub requirements (§ 226) and the minimum wage requirements (§§ 203/1197). Brewer's action sought wages, penalties and attorney fees under the provisions of the Labor Code.

The jury returned special verdicts in favor of Brewer on most of her pleaded Labor Code claims. The trial court's judgment entered on the special verdicts included approximately $6,000 for unpaid meal and rest break wages (§ 226.7), $4,000 as pay stub penalties (§ 226), and $15,300 for minimum wage penalties (§ 1197.1).[2]

In this appeal, Cottonwood challenges the trial court's order denying its motion to set aside portions of the judgment as void under Code of Civil Procedure section 473, subdivision (d) (section 473, subdivision (d)). Cottonwood's motion principally argued the judgment granting various forms of relief under the Labor Code was void because (1) Brewer had not exhausted her administrative remedies, and (2) the statute of limitations

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1 All statutory references are to the Labor Code unless otherwise specified.

2 The original judgment also included $195,000 in punitive damages and found Brewer was the prevailing party entitled to attorney fees and costs. In a series of rulings on a variety of posttrial motions, the trial court ordered (1) Brewer would be entitled to attorney fees of $64,710 plus costs totaling $8,778.85, and (2) Brewer could accept a reduced punitive damages award of $75,000 or Cottonwood would be entitled to a new trial on the ground of excessive damages. The judgment incorporating the underlying jury verdict, as well as the rulings on these posttrial motions, is the subject of and resolved by our opinion in a related appeal. (See *Brewer v. Premier Golf Properties* (Dec. 3, 2008, D050686) ___ Cal.App.4th ___ (*Brewer I*).) Although Brewer subsequently submitted an amended judgment accompanied by her attorney's letter consenting to the reduced punitive damages award, her proposed amended judgment erroneously failed to adjust the punitive damages award. When Brewer recognized the mistake, she submitted a proposed second amended judgment to reflect the reduced punitive damages award. The court's subsequent entry of this latter judgment is the subject of yet another appeal pending before this court. (*Brewer v. Premier Golf Properties*, D052617, *Brewer III*.) Our disposition of *Brewer I* makes the procedural missteps below that generated *Brewer III* a matter of historical interest only.

barred the award of some of the penalties. The trial court denied the motion, and this appeal followed.[3]

I

FACTUAL AND PROCEDURAL BACKGROUND

A. The Complaint

Brewer was a waitress at the Cottonwood Golf Course restaurant. She was paid an hourly wage by Cottonwood. After she was assigned to less desirable shifts, she quit her job and two months later filed this lawsuit. Her initial complaint alleged she was denied the meal breaks and rest breaks mandated under Labor Code section 226.7, and sought wages, penalties and attorney fees. Brewer's First Amended Complaint added other Labor Code claims, alleging Cottonwood did not pay her the wages she earned for the hours she actually worked, and therefore (1) did not pay her wages at the required minimum wage, and (2) did not give her accurate itemized wage statements. She similarly sought damages, penalties and attorney fees for these violations. Neither her original nor First Amended Complaint alleged she had complied with the notice

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3 The trial court's July 31, 2007, order, in addition to denying Cottonwood's request for relief under section 473, subdivision (d), also denied Cottonwood's motion for reconsideration of the court's ruling on Brewer's attorney fees and costs motion. In the present appeal, Cottonwood purports also to appeal from the order insofar as the court denied the motion for reconsideration. This court has concluded an order denying a motion for reconsideration is not an appealable order (*Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1454-1459), and we therefore do not further discuss Cottonwood's claims insofar as Cottonwood attempts to challenge denial of reconsideration of the rulings awarding attorney fees and costs.

requirements of section 2699.3.[4] However, Cottonwood did not demur or otherwise interpose noncompliance with section 2699.3 before trial.

B. The Evidence and Judgment

In *Brewer I*, we concluded substantial evidence at trial supported the jury's finding in Brewer's favor on her claim she was denied the meal breaks and rest breaks mandated under section 226.7, and there was substantial evidence to support the jury's finding in her favor on her claim that Cottonwood did not pay her wages at the required minimum wage and did not give her accurate itemized wage statements. The jury found Cottonwood paid Brewer less than the minimum wage, Brewer was owed $801.32 in unpaid wages, and she had not been paid the minimum wage for a total of 62 pay periods. The jury also found Cottonwood had paid Brewer less than the legal overtime compensation, and Brewer was owed $154.78 in unpaid overtime wages. The jury found Cottonwood had not provided Brewer with meal periods on 392 occasions, had not provided her with rest periods on 491 occasions, and had on 68 occasions knowingly and

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[4] An employee may bring a private action seeking certain kinds of penalties on satisfying the conditions of section 2699.3. (§ 2699, subd. (a).) Under section 2699.3, subdivision (a), the aggrieved employee must provide written notice to the Labor and Workforce Development Agency (LWDA) and the employer of the specific provision of this code alleged to have been violated, including the facts and theories to support the alleged violation. (*Id*. at subd. (a)(1).) Within 30 calendar days of that notice, the LWDA must notify the employer and the aggrieved employee whether it intends to investigate the alleged violation. (*Id*. at subd. (a)(2)(A).) If the LWDA notifies the aggrieved employee it does not intend to investigate, or does not give notice within the prescribed time period, the aggrieved employee may commence a civil action under section 2699. (*Ibid.*) If the LWDA chooses to investigate, it has an additional 120 days to do so and issue any appropriate citation; if, after investigation, the LWDA provides notice that no citation will issue or fails to give timely or any notification, the aggrieved employee may then file suit. (*Id*. at subd. (a)(2)(B).)

intentionally failed accurately to set forth the total hours she worked on her itemized wage statements.

The judgment, entered by the court on February 1, 2007, based on the jury's special verdicts, incorporated the jury's awards for unpaid wages in the total amount of $956.10, and included (1) $2,646 for wages due for meal period violations and $3,314.25 for wages due for rest period violations (apparently under section 226.7); (2) $4,000 as penalties pursuant to section 226; and (3) $15,300 in penalties pursuant to section 1197.1. The judgment also incorporated a provision entitling Brewer to recover attorney fees under the Labor Code, and the court entered a subsequent order awarding attorney fees in the total amount of $64,710.

Cottonwood moved for judgment notwithstanding the verdict or alternatively for a new trial, but neither motion asserted exhaustion of administrative remedies as a basis for entering judgment in Cottonwood's favor. Other than a cryptic reference by Cottonwood's attorney during a bench conference after the jury returned their initial set of special verdicts, it appears Cottonwood first attempted to raise this issue in connection with its motion under section 473, subdivision (d), asserting the court should vacate the judgment as void.

C. Cottonwood's Motion to Vacate the Judgment

After the judgment in *Brewer I* was entered, Cottonwood moved under section 473, subdivision (d) to set aside the judgment as void for lack of jurisdiction. Cottonwood asserted that a prerequisite to pursuing relief under sections 226, 226.7 and 1197.1 is that the plaintiff exhaust the administrative procedures under section 2699.3,

and Brewer's failure to comply with those procedures deprived the court of jurisdiction to make any award under sections 226, 226.7 or 1197.1. Cottonwood also contended a court does not have jurisdiction to make awards for claims barred by the statute of limitations, and because some of the amounts awarded were purportedly barred by limitations, the judgment was partially void. The court denied the motion to vacate the judgment, and Cottonwood appeals.

II

ANALYSIS

A. Legal Standards

The court's power to set aside a void judgment under section 473, subdivision (d), differs from its power to relieve a party of a default because of mistake or excusable neglect. (Cf. *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1076.) The power to set aside a void judgment under section 473, subdivision (d), like the court's power to vacate a judgment under its inherent equitable powers, exists when the judgment is void because the court did not have subject matter jurisdiction or personal jurisdiction over the defendant, or because the judgment granted relief the court had no power to grant. (See generally 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, §§ 201-204, 214-222, pp. 706-710, 718-727; *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 830.) Accordingly, if the judgment in *Brewer I* is not void for lack of either subject matter jurisdiction or personal jurisdiction, we must affirm the trial court's order denying Cottonwood's motion under section 473, subdivision (d).

B. The Failure to Pursue Administrative Procedures

Cottonwood asserts the trial court erroneously denied his motion under section 473, subdivision (d), because, absent compliance with the administrative procedures under section 2699.3, a court does not have jurisdiction over the Labor Code claims pleaded in Brewer's lawsuit. Cottonwood argues, although it did not raise this issue before judgment was entered, jurisdictional issues are never waived and may be raised at any time because a judgment by a court that does not have jurisdiction is void ab initio and can be set aside at any time. (*Wettstein v. Cameto* (1964) 61 Cal.2d 838, 840.) Cottonwood, relying on *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280 (*Abelleira*), asserts that because Brewer did not exhaust the procedures set forth in section 2699.3, the court did not have subject matter jurisdiction over these claims and the resulting judgment was therefore void, and the court should have granted its motion to vacate the judgment.[5]

The Administrative Procedures

The Labor Code specifies that any provision of that code that permits the LWDA to seek to recover a civil penalty against the employer "may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself . . . pursuant to the procedures specified in Section 2699.3." (§ 2699, subd.

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[5] The bulk of Cottonwood's arguments in this appeal focus on whether the notice provisions of section 2699.3 were a condition to Brewer's pursuit of the pleaded claims, and Cottonwood's requests for judicial notice of the legislative history of the statutory scheme are in support of its argument that such notice was required. Considering our conclusion that Cottonwood waived the argument, we do not reach the merits of its claims, and we also deny the request for judicial notice as moot.

(a).) The aggrieved employee's ability to file a civil action to recover civil penalties under section 2699, at least as to alleged violations of any Labor Code provision identified in section 2699.5, is conditioned on satisfaction of the administrative procedures outlined in section 2699.3, subdivision (a). (See fn. 4, *ante*.) These administrative procedures apply to actions to recover civil penalties for alleged violations of numerous Labor Code provisions identified in section 2699.5. As relevant here, the notice requirements of section 2699.3, subdivision (a), apply to actions seeking civil penalties that may be assessed and collected under sections 226 (pay stub violations), 226.7 (mandatory meal and rest breaks), and 1197.1 (minimum wage).[6]

The Trial Court Jurisdiction

We are convinced, based on the reasoning of *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212 (*Green*) and *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121 (*Mokler*), that although Cottonwood could have forced Brewer to comply with Section 2699.3 by timely raising the issue, Brewer's noncompliance did not deprive the court of subject matter jurisdiction to enter a judgment awarding penalties under the Labor Code, and therefore the instant judgment is not void and subject to collateral attack under section 473, subdivision (d).

Cottonwood is correct that, when a judgment is void for lack of jurisdiction, it is subject to collateral attack and may be vacated at any time (*Rochin v. Pat Johnson*

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6 The limitations on an employee's ability to pursue these civil penalties does not "limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." (§ 2699, subd. (g)(1).)

Manufacturing Co. (1998) 67 Cal.App.4th 1228, 1239), including by motion under section 473, subdivision (d). Cottonwood is also correct that, in *Abelleira*, the court characterized the exhaustion of administrative remedies as jurisdictional, at least in one of the "many different meanings" the term jurisdiction encompasses. (*Abelleira, supra*, 17 Cal.2d at pp. 287, 293.) However, *Abelleira* also recognized and cautioned that, because the term " 'jurisdiction' . . . has so many different meanings" (*id.* at p. 287), it is necessary to refine the sense in which it is employed because:

> "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. . . . [¶] But in its ordinary usage the phrase 'lack of jurisdiction' is not limited to these fundamental situations. For the purpose of determining the right to review by *certiorari*, restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." (*Id*. at p. 288.)

The *Abelleira* court, considering whether a reviewing court could issue a writ of prohibition to prevent a lower court from acting without, or in excess of, jurisdiction, cautioned against interpreting the term "jurisdiction" too narrowly when applied in the context of a writ of prohibition or certiorari, concluding: "The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by

precedent made mandatory and jurisdictional." (*Id*. at p. 291.) *Abelleira,* applying the broad latter definition of "jurisdiction" in the matter before it, held exhaustion of administrative remedies was a jurisdictional requirement before a court could entertain the lawsuit then pending before it. However, in reaching this conclusion, the court did *not* hold exhaustion of administrative remedies implicated a court's *subject matter* jurisdiction over that lawsuit, but instead viewed the exhaustion doctrine as "a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis,* and binding upon all courts." (*Id*. at p. 293.)

In *Green, supra,* 194 Cal.App.3d 212, this court wrestled with *Abelleira's* characterization of the exhaustion doctrine as jurisdictional and ultimately concluded "*Abelleira* makes it abundantly clear that the exhaustion doctrine does *not* implicate subject matter jurisdiction but rather is a 'procedural prerequisite' 'originally devised for convenience and efficiency' and now 'followed under the doctrine of *stare decisis* . . . .' [Quoting *Abelleira, supra,* 17 Cal.2d at pp. 288, 291.] *It is 'jurisdictional' only in the sense that a court's failure to apply the rule in a situation where the issue has been properly raised can be corrected by the issuance of a writ of prohibition*." (*Green,* at p. 222, italics added.) *Green* ultimately concluded the exhaustion doctrine did not implicate subject matter jurisdiction because it held a party could not raise the issue for the first time on appeal by asserting the resulting judgment was void. As *Green* observed, exhaustion was not an "inflexible dogma," but was subject to numerous exceptions (*ibid.*), and as a judicially-created rule of procedure, exhaustion is not a doctrine that a court should allow a party to use inequitably, observing, "We think it

would be grossly unfair to allow a defendant to ignore this potential procedural defense at a time when facts and memories were fresh and put a plaintiff to the time and expense of a full trial, knowing it could assert the failure to exhaust administrative remedies if it received an adverse jury verdict. The exhaustion doctrine is simply a 'procedural prerequisite' [citation] the City decided to forego. Having elected to put Green to his proof before a jury, the City's dissatisfaction with that result is an insufficient reason for reversal." (*Id*. at pp. 222-223.)

In *Mokler*, the court followed *Green* and concluded the failure to exhaust administrative remedies did not deprive a court of subject matter jurisdiction. The *Mokler* court, after extensively reviewing both *Abelleira's* and *Green's* analysis of the proper placement of the exhaustion doctrine within the realm of questions of jurisdiction (*Mokler, supra,* 157 Cal.App.4th at pp. 133-135), held that "[a]lthough earlier cases tended to view the exhaustion doctrine as invalidating a court's subject matter jurisdiction, thus allowing a defendant to raise it at any time [citations], later cases have generally followed *Green* in concluding a defendant waives the defense by failing to timely assert it. [Citations.]." (*Id.* at p. 135.) *Mokler*, following *Green* and its progeny, held a defendant who does not raise the exhaustion defense until after judgment is entered has waived the issue and may not attack the judgment as void for lack of jurisdiction for the first time on appeal.[7] (*Mokler, supra,* 157 Cal.App.4th at pp. 133, 136.)

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7 The federal courts, examining the analogous question of whether the filing of a complaint with the Equal Employment Opportunity Commission (EEOC) was a jurisdictional prerequisite to a title VII civil action, have concluded an EEOC complaint is not jurisdictional but is instead "in the nature of a condition precedent or an affirmative

We agree with *Mokler* and *Green* that, although Cottonwood could have forced Brewer to comply with Section 2699.3 if it had timely raised the issue, Cottonwood waived the exhaustion defense by waiting until after the judgment was entered to assert it.[8] Because a court has *subject matter* jurisdiction to enter a judgment awarding penalties under the Labor Code, the instant judgment is not *void* within the narrow ambit of judgments that may be set aside by motion under section 473, subdivision (d).

C. The Statute of Limitations

An action seeking statutory penalties is subject to the one-year statute of limitations under Code of Civil Procedure section 340, subdivision (a), unless the statute imposing the penalty provides otherwise. (Cf. *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225, 229.) Cottonwood argues the trial court did not have jurisdiction to award penalties, at least to the extent the judgment included penalties for violations

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defense that can be waived if it is not asserted by the defendant. [Citations.]" (*Keiffer v. Bechtel Corp*. (1998) 65 Cal.App.4th 893, 901, fn. 6.)

[8] Our conclusion finds additional support in the fact that, if Cottonwood *had* timely raised the issue, either by demurrer or affirmative defense, Brewer could have given the requisite notice and, if the LWDA either notified Brewer it did not intend to investigate or failed to give notice within the prescribed time period, Brewer would have been able to timely amend her existing action to pursue the Labor Code claims. (See § 2699.3, subds. (a)(2)(A) & (a)(2)(C).) Alternatively, if the LWDA had chosen to investigate, but after an additional 120 days either provided notice that no citation would issue or failed to give timely or any notification, Brewer also would have been entitled to pursue these claims (*id*. at subd. (a)(2)(B)) by amendment to her existing action. Under these circumstances, "it would be grossly unfair to allow a defendant to ignore this potential procedural defense . . . and put a plaintiff to the time and expense of a full trial, knowing it could assert the failure to exhaust administrative remedies if it received an adverse jury verdict. . . . Having elected to put [Brewer] to [her] proof before a jury, [Cottonwood's] dissatisfaction with that result is an insufficient reason for reversal." (*Green, supra*, 194 Cal.App.3d at pp. 222-223.)

occurring more than one year prior to the June 1, 2005, filing date of Brewer's complaint, and this aspect of the judgment is therefore void and should have been stricken. (*Id*. at p. 233 [trial court correctly struck allegations seeking waiting time penalties under section 203 occurring more than one year before date complaint was filed].)

However, the statute of limitations is an affirmative defense that is waived if not timely interposed. (Cf. *In re Andrew V.* (1991) 232 Cal.App.3d 1286, 1291-1292.) Although Cottonwood correctly notes that a void judgment is subject to collateral attack at any time, including on appeal (*Falahati v. Kondo, supra*, 127 Cal.App.4th at p. 831, fn. 18), Cottonwood has "confuse[d] errors in excess of jurisdiction with errors of substantive law which are within the court's jurisdiction. Collateral attack is proper to contest lack of personal or subject matter jurisdiction or the granting of relief which the court has *no power* to grant [citations]. Nonjurisdictional errors, however, are not appropriate procedural targets within this context." (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950.)[9] The expiration of the statute of limitations does not deprive the trial

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9 The same confusion also undermines Cottonwood's assertion that we should find the judgment void based on the trial court's alleged misapplication of section 226.7 when it calculated the award for missed meal and rest breaks. Cottonwood asserts the trial court awarded one additional hour of pay for each meal break or rest break Brewer was denied, but section 226.7 provides for one additional hour of pay for each *day* a break is not provided, regardless of how many rest or meal breaks the worker may have missed on that day. However, Cottonwood does not identify where this claim was raised before either the return of the special verdicts or the entry of judgment below, and our independent review of the record on appeal has not uncovered any timely mention of this claim below. A party may not raise a new theory of defense for the first time on appeal when that theory depends on factual issues not tendered or resolved below. (Cf. *McDonald's Corp. v. Board of Supervisors* (1998) 63 Cal.App.4th 612, 618.) The section 226.7 award rested on the jury's findings on the total number of days she missed a meal period or rest periods, and whether the jury's findings on the total number of work days

court of subject matter jurisdiction over the claim. (*In re Andrew V., supra.*) Because Cottonwood did not raise the statute of limitations defense to the penalties prior to entry of judgment, the defense was waived. Accordingly, the judgment awarding penalties was not void as being in excess of the court's jurisdiction, and the trial court's order denying Cottonwood's motion to vacate the judgment under the auspices of section 473, subdivision (d), was correct.

DISPOSITION

The order is affirmed. Brewer is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.

may have involved overlapping work days is a factual issue not tendered or resolved below. Although an award of one hour's pay for each missed meal or rest period may constitute an error if the trier of fact had concluded that there were multiple missed meal and rest periods on a single work day, it would be an error of substantive law rather than an error in excess of jurisdiction. Cottonwood waived this argument by failing timely to tender the factual predicate for its argument to the jury, and the resulting judgment was not void as being in excess of the trial court's jurisdiction.